UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S INC.,	)	
	)	
and	)	Case No. 30-CA-17185
	)	
MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO	)	
	)	

BRIEF OF *AMICUS CURIAE*
ASSOCIATED BUILDERS AND CONTRACTORS, INC.
IN SUPPORT OF RESPONDENT

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January 7, 2011

INTEREST OF *AMICUS CURIAE*

Associated Builders and Contractors, Inc. (ABC) is a national construction industry trade association whose 25,000 members share the belief that all construction work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC has filed many *amicus* briefs with the Board and the courts in order to promote and defend the right of construction contractors and their customers to engage in free enterprise without being improperly and unlawfully coerced by labor organizations who typically do not represent the employees performing the work.

ABC is a member of The Coalition for a Democratic Workplace (the "Coalition"), an amalgam of hundreds of employer associations and other organizations in every industry sector which is also filing an *amicus* brief in this matter. ABC agrees with and incorporates by reference the Coalition brief. However, ABC is compelled to write separately because many ABC members have been the particular targets of the type of construction union boycott activity that is the subject of this case. The union practice of demanding access to the private property of ABC members' customers is injurious to commerce and property rights that have long been protected by law. The Board's past restrictions on the right of employers to refuse access to unions seeking to engage in conduct harmful to the employer have been repeatedly rejected by the courts and should now be overruled.

ABC fully agrees with the Coalition that the Board should stop applying the standard set forth in the *Sandusky Mall* case, which the courts have refused to enforce. The Board should now hold that employers cannot be required to allow nonemployee union agents to trespass on private property for the purpose of harming the employer's business through consumer boycotts.

ARGUMENT

I. Employers Should Not Be Required To Allow Nonemployee Union Agents To Trespass On Private Property With The Intent Of Harming The Employer's Business.

In *Sandusky Mall Co.*, 329 NLRB 618 (1999), *enf. den*. 242 F. 3d 682 (6th Cir. 2001); the Board purported to apply to union boycotters' demands for access to private property the "discrimination" standard of the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992), and *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956). Misinterpreting the Supreme Court's standard, the Board held that nonemployee union agents who were engaged in a consumer boycott could not be refused access to the private property of the target of the boycott, where the property owner had "discriminated" by allowing non-labor organizations to engage in other, non-harmful forms of solicitation.

ABC submits that the Board in *Sandusky Mall* and similar cases acted upon a false premise. The Board incorrectly interpreted the Supreme Court's "discrimination" standard, which was designed to permit certain "organizational" activities aimed at employees on private property, as somehow applying to the very different context of nonemployee boycott activities that are aimed at consumers and are intended to harm the employer who owns the private property at issue. To the contrary, the Fourth Circuit in *Be-Lo Stores v. NLRB,* 126 F. 3d 268, 284 (4th Cir. 1977), and the Supreme Court itself in *Sears Roebuck & Co. v. San Diego County Carpenters District Council,* 436 U.S. 180, 206, n. 42 (1978), recognized that the *Lechmere/Babcock* discrimination standard does not apply to harmful boycott activities.[1] Here,

[1] "[W]e seriously doubt, as do our colleagues in other circuits, that the *Babcock & Wilcox* disparate treatment exception, post-*Lechmere*, applies to nonemployees who do not propose to engage in organizational activities …." *Be-Lo Stores v. NLRB, supra*, 126 F. 3d at 284. *See also Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, *supra*, 436 U.S. at 206, n. 42 (1978) ("Area standards picketing … has no … vital link to the employees located on the employer's property.").

the access claims of nonemployee labor organizations are "at their nadir." *Id*. at 284.

Nothing in the National Labor Relations Act entitles a nonemployee union to force an employer to give up its private property rights to permit actions by a trespasser (the union) whose explicit purpose is to harm the employer or its tenants. The Board's position over the past decade has given unions an unwarranted weapon which they have used against neutral customers of construction contractors such as members of ABC. Absent the intervention of the courts, customers have been told by the Board that they must give up their property rights as a potential condition of doing business with non-union construction contractors. That is not the law, and the Board's policy as expressed in *Sandusky Mall* is plainly harmful to free enterprise and commerce in the construction industry.[2]

ABC also agrees with the numerous appeals court holdings that have denied enforcement to the Board's overbroad discrimination standard.[3] These cases demonstrate that even if the Supreme Court's discrimination standard is applied to unions' consumer boycott activity, it is highly unlikely that an employer should be properly found to have discriminated in favor of a comparable non-union activity. This is because few if any employers willingly allow their private property to be used in a manner that is directly harmful to the employer's business interests. Thus, the act of allowing beneficent solicitation by non-labor organizations, while refusing union access for consumer boycotting that is plainly harmful to the employers' business objectives, is not "discrimination" between comparable activities, and is not unlawful. *See, e.g., Sandusky Mall Co. v. NLRB, supra*, 242 F. 3d 682 (agreeing with Member Brame's dissent that

[2] As the Supreme Court held in *Lloyd Corp. Ltd v. Tanner*, 407 U.S. 551, 569 (1972), forcing an employer to give up its private property to a union whose purpose is to harm the employer's business can also be an unconstitutional "taking" under the Fifth Amendment to the United States Constitution.

[3] See, e.g., *Salmon Run Shopping Center LLC v. NLRB*, 534 F. 3d 108 (2d Cir. 2008); *Sandusky Mall Co. v. NLRB*, 242 F. 3d 682 (6th Cir. 2001); *Be-Lo Stores v. NLRB*, 126 F. 3d 268, 284 (4th Cir. 1997); *Cleveland Real Estate Partners v. NLRB*, 95 F. 3d 457 (6th Cir. 1996);*NLRB v. Pay-Less Drug Stores Northwest, Inc*., 1995 WL 323832 (unpub.) (9th Cir. 1995).

"discrimination" must "be among comparable groups or activities."); see also *Salmon Run Shopping Center LLC v. NLRB*, 534 F. 3d 108 (2d Cir. 2008) ("The solicitation of Muscular Dystrophy donations by firefighters or the distribution of educational promotional materials on Higher Ed Night do not serve as valid comparisons to the Carpenters' Union distribution of literature touting the benefits of its apprenticeship programs or decrying the failure of a mall tenant to pay area standard wages.").

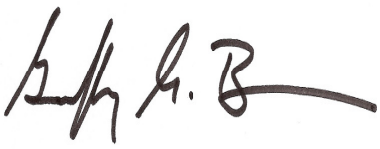
Whichever analysis the Board chooses to adopt, therefore, the result should be the same. Under any common sense interpretation of the NLRA, the Board should find that employers do not violate the Act by refusing access to private property by nonemployee unions seeking to engage in consumer boycott activity.[4]

[4] The Board's holding in *Register Guard*, 351 NLRB 1110 (2007), *en.f den. in part* 571 F. 3d 52 (D.C. Cir. 2009), supports ABC's position that *Sandusky Mall* should be overruled, for reasons that are fully set forth in the Coalition brief.

Conclusion

For the reasons set forth above and in the Coalition's *amicus* brief being filed this date, the Board should overrule its decision in *Sandusky Mall* and similar cases. The Board should adopt a new standard which recognizes that no employer should be required to give private property access to a nonemployee labor organization for the purpose of engaging in activities, such as consumer boycott handbilling, which are plainly harmful to the business of the owner of the property.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the undersigned has filed this brief electronically with the Board and is therefore serving the following parties electronically in accordance with Section 102.114 of the Board's Rules, this 7th day of January, 2011:

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